Thomas-Davis Medical Centers, P.C., and its Parent Corporation and Owner, FPA Medical Management, Inc. *and* Federation of Physicians and Dentists/AHPE, NUHHCE, AFSCME, AFL–CIO. Case 28–CA–14177

July 24, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Pursuant to a charge and amended charges filed on February 21, March 26, and April 24, 1997, the General Counsel of the National Labor Relations Board issued an amended complaint and notice of hearing on April 24, 1997, alleging that the Respondents, Thomas-Davis Medical Centers, P.C. (TDMC) and its parent company and owner, FPA Medical Management, Inc. (FPA) have violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 28-RC-5449 as the exclusive bargaining representative of the physicians employed at the Respondents' Pima County, Arizona facility.[1] (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) On May 2, the Respondents filed an answer to the amended complaint admitting in part and denying in part the allegations in the amended complaint.

On May 28, the General Counsel filed a Motion to Transfer and Continue Matter Before the Board, Motion to Strike and for Summary Judgment and Motion to Warn Respondent's Counsel. On May 29, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motions should not be granted. On June 12, 1997, the Respondents filed an opposition to the General Counsel's motions, together with an amended answer to the amended complaint, and a motion to consolidate the proceeding with Case 28–CA–14338. On June 20 and 30, 1997, the Charging Party and the General Counsel, respectively, filed replies to the Respondents' opposition and motion to consolidate.

Ruling on Motion for Summary Judgment

In their amended answer and response, the Respondents admit their refusal to bargain, but they attack the validity of the certification on the grounds that the physicians are supervisors or managerial personnel. In addition, the Respondents assert that the Union is not qualified to act as the collective-bargaining representative of the unit because the Union is dominated, controlled and/or influenced by persons who occupy supervisory and/or management positions with TDMC. Although the Respondents acknowledge that these issues relate to the representation proceeding, the Respondents assert that the Board should afford a hearing in the instant proceeding on the Respondents' defenses because Respondent FPA, the alleged parent company and owner of Respondent TDMC, was not affiliated with TDMC at the time of the representation hearing and had no opportunity to present evidence on the issues.[2]

All representation issues raised by the Respondents were or could have been litigated in the representation proceeding. The Respondents do not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor do they allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[3]

[1] Unless otherwise stated, all dates are in 1997.

[2] As indicated above, the Respondents also request that the instant case be consolidated with another complaint (Case 28–CA–14338), which alleges that the Respondents made certain unlawful unilateral changes and is currently pending before an administrative law judge. The Respondents' request to consolidate is denied. See *Kolkka Tables and Finnish-American Saunas*, 323 NLRB 958 fn. 3 (1997), and cases cited there. In addition, the Respondents have filed a request for special permission to appeal the Regional Director's denial of Respondents' request for subpoenas and application to take depositions in the instant case. Inasmuch as we find, infra, that the Respondents have not raised any issue that is properly litigable in this proceeding, the Respondents' request for special permission to appeal is denied. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 6 (1992); *Majestic Molded Products*, 282 NLRB 123, 124 (1986); *Brinks Inc. of Florida*, 276 NLRB 1, 2 fn.3 (1985); *Modesti Bros.*, 255 NLRB 828, 830 (1981); *A.G. Parrott Co.*, 237 NLRB 191, 192 fn. 3 (1978), enf. denied on other grounds 630 F.2d 212 (4th Cir. 1980); and *Catalina Plastic Suppliers*, 235 NLRB 149, 150 fn. 3 (1978).

[3] All representation issues raised by the Respondents here were addressed by the Regional Director and the Board in the representation proceeding. Thus, in its November 26, 1996 request for review of the Regional Director's Decision and Direction of Election in Case 28–RC–5449, Respondent TDMC specifically contested both the Regional Director's conclusion that the physicians were not statutory supervisors or managerial personnel and his refusal to dismiss the petition on the basis of the pending sale of TDMC's business operations and the changes in operational structure that might result therefrom. On January 7, the Board issued its Order denying the request for review as it raised no substantial issues warranting review.

Thereafter, on January 8, Respondent FPA, the new owner of TDMC, filed a Motion for Rehearing and to Reopen the Record, stating in pertinent part that ''FPA had no opportunity to participate in the proceedings before the Regional Director, as those proceedings had occurred prior to the closing of the acquisition,'' and that the Board should also consider evidence of changes in operations implemented by FPA. On January 17, the Board issued its Order denying FPA's motion on the grounds that the Respondent failed to specify what additional evidence would be presented and how, if credited, such evidence would require a different result, and had failed to raise any issue not previously considered.

Thereafter, on February 19, following the Union's February 3 certification, Respondent FPA filed a second Motion for Rehearing and to Reopen the Record, again stating that it had no opportunity to participate in the original representation hearing, and attaching the affidavit of Respondent TDMC Chief Executive Officer Glen Ran-

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We therefore find that the Respondents have not raised any issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the General Counsel's Motion for Summary Judgment.[4]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Respondent TDMC has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Arizona.

At all times material herein, and until about November 29, 1996, TDMC maintained an office and places of business in Pima County, Arizona, where it was engaged in the business of providing multispecialty medical care in the health care industry.

During the 12-month period ending April 24, 1997, TDMC, in the course and conduct of its business operations described above, derived gross revenues therefrom in excess of $250,000 and purchased and received in interstate commerce at its Pima County, Arizona facilities products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Arizona. We find that TDMC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act,[5] and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[6]

On December 10, 1996, Respondent FPA acquired all the stock of Respondent TDMC. The sale was effective November 29, 1996, and the day-to-day operations of TDMC's Pima County, Arizona facilities were assumed by an affiliate of FPA about that date.[7]

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held December 5, 1996, the Union was certified on February 3, 1997, in Case 28–RC–5449, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All regular full-time and part-time physicians, including department chairs, employed by the Employer at facilities located in Pima County, Arizona, excluding all other employees, physician medical directors, assistant medical directors, and members of the Employer's Board of Directors, guards and supervisors as defined in the Act.[8]

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since February 15, the Union has requested the Respondents to bargain and, since February 28, the Respondents have refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after February 28, 1997, to bargain with the Union as the exclusive collective-bar-

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dolph to support its contention that the unit physicians are statutory supervisors. On March 18, the Board issued its Order denying Respondent's second motion on the ground that it was untimely filed and because it failed to establish the existence of newly discovered evidence.

In the meantime, on February 19, Respondent FPA also filed a unit clarification petition with the Regional Director requesting that the unit be clarified to exclude statutory supervisors and managers. By letter dated March 6, the Regional Director dismissed the unit clarification petition on the grounds that the central issue raised by the petition had already been fully litigated in Case 28–RC–5449. Respondent FPA thereafter filed a request for review of the Regional Director's decision, again arguing that as a new owner it should be entitled to present evidence on the supervisory issue. On May 7, the Board issued an order denying the Respondent's request for review.

Finally, on May 5, while Respondent FPA's request for review in the unit clarification case was pending before the Board, the Respondents filed with the Board a Motion to Revoke the Certification in Case 28–RC–5449. The Respondents asserted therein, for the first time, that the Union was not qualified to act as collective-bargaining representative of the unit inasmuch as the Union allegedly is dominated and controlled by statutory supervisors. On June 2, 1997, the Board issued an Order denying Respondent's motion.

[4] As indicated above, counsel for the General Counsel also requests the Board to strike certain of Respondents' affirmative defenses. As we have granted the General Counsel's Motion for Summary Judgment, we find it unnecessary to address the General Counsel's request to strike certain affirmative defenses.

[5] The Respondents' amended answer filed on June 12 admits the foregoing jurisdictional allegations.

[6] Although the Respondents' amended answer denies, based on insufficient knowledge, the Union's labor organization status, Respondent TDMC stipulated to the Union's labor organization status in the underlying representation proceeding in Case 28–RC–5449. Accordingly, the Respondents are precluded from contesting the Union's status in the instant proceeding. See *Biewer Wisconsin Sawmill*, supra at 732 fn. 1.

[7] The foregoing facts regarding FPA's acquisition of TDMC are contained in the Respondents' amended answer and an affidavit attached to the Respondents' response. Although the amended complaint alleges that FPA completed the acquisition of TDMC on June 21 and 28, 1996, the Respondents deny this allegation. For purposes of ruling on the motion for summary judgment, we assume the facts regarding the acquisition are as stated by the Respondents. We also note that Respondent FPA recently stipulated in another case involving a representation petition filed in another bargaining unit (Case 28–RC–5480) that it is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

[8] Although the unit description set forth in the complaint is somewhat different, we infer, in the absence of any explanation otherwise, that this was an inadvertent error. The unit description set forth herein is the description set forth in the certification.

gaining representative of employees in the appropriate unit, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have violated Section 8(a)(5) and (1) of the Act, we shall order them to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondents begin to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

As indicated above, the General Counsel also requests the Board to issue a warning to Respondents' counsel for denying certain allegations of the complaint without good grounds and filing repeated motions with the Board seeking to relitigate issues that had already been decided by the Board in the representation proceeding. In addition, in its reply to the Respondents' opposition and motion to consolidate, the Charging Party has requested that the Board order Respondents to reimburse it for the attorney's fees it incurred in responding to the Respondents' repetitive motions and frivolous defenses in the instant 8(a)(5) and underlying representation proceedings.

Having duly considered the matter, we deny both motions. With respect to the General Counsel's motion, the Respondents assert in their response that certain of the denials in their answer were not made in bad faith but were merely an unintended error, and, as indicated above, the Respondents have filed an amended answer with their response revising and clarifying their prior answer in certain respects. As for the Respondents' repeated motions in the representation proceeding, the Board has advised the Respondents' counsel in the representation proceeding about the effect of filing repetitious motions,[9] and, accordingly, no further warning is necessary in the instant proceeding.

With respect to the Union's motion for attorneys fees, the Board denied the Union's similar requests in the representation proceeding, which the Union made in response to the Respondents' second motion to reopen and motion to revoke the certification. Further, although we have advised the Respondents' counsel about the effect of filing repetitious motions in the representation proceeding, we do not find that the Respondents' overall position in the representation proceeding regarding the supervisory and/or managerial status of the physicians was frivolous.[10] We therefore also do not fault the Respondents for asserting the same position in the instant ''technical'' 8(a)(5) test-of-certification case. The Respondents have appropriately done so as part of their effort to obtain court review of the Board's determinations in the representation proceeding. Accordingly, we find that an award of attorneys fees in this proceeding is unwarranted.

ORDER

The National Labor Relations Board orders that the Respondents, Thomas Davis Medical Centers, P.C. and its Parent Corporation and Owner, FPA Medical Management, Inc., Pima, Arizona, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Federation of Physicians and Dentists/AHPE, NUHHCE, AFSCME, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time and part-time physicians, including department chairs, employed by the Employer at facilities located in Pima County, Arizona, excluding all other employees, physician medical directors, assistant medical directors, and members of the Employer's Board of Directors, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Pima County, Arizona, copies of the attached notice marked ''Appendix.''[11] Copies of the

[9] By order dated July 18, 1997, the Board denied the Union's cross motion for attorneys fees, costs, and sanctions against the Employer, which the Union requested in response to the Employer's motion to revoke certification. See discussion at fn. 3, supra. The Board, however, advised Respondents' counsel that the filing of any further repetitious motions in the representation proceeding or other Agency proceedings may warrant referral of the matter to the investigating officer for possible disciplinary proceedings under Sec. 102.177 of the Board's Rules, 61 Fed.Reg. 65323 (1996).

[10] See generally *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enf. denied in relevant part 118 F.3d 795 (D.C. Cir. 1997).

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a *Continued*

notice, on forms provided by the Regional Director for Region 28 after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since February 21, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the Federation of Physicians and Dentists/AHPE, NUHHCE, AFSCME, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All regular full-time and part-time physicians, including department chairs, employed by us at facilities located in Pima County, Arizona; excluding all other employees, physician medical directors, assistant medical directors, and members of our Board of Directors, guards, and supervisors as defined in the Act.

THOMAS-DAVID MEDICAL CENTERS, P.C., AND ITS PARENT CORPORATION AND OWNER, FPA MEDICAL MANAGEMENT, INC.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''